

April 15, 1988

DOCKETED  
USNRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'88 APR 18 A11:24

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

SECRETARY  
DOCKETING & SERVICE  
BRANCH

In the Matter of	)	
	)	
TEXAS UTILITIES ELECTRIC	)	Docket Nos. 50-445-OL
COMPANY, <u>ET AL.</u>	)	50-446-OL
	)	50-445-CPA
(Comanche Peak Steam Electric	)	
Station, Units 1 and 2)	)	

NRC STAFF MOTION FOR RECONSIDERATION OR  
CLARIFICATION OF ORDER OF APRIL 5, 1988

I. INTRODUCTION

On April 5, 1988, the Atomic Safety and Licensing Board (Licensing Board) designated to preside over the above-captioned proceedings denied Applicants' motion to consolidate the two proceedings. Memorandum and Order (Motion to Consolidate) (April 5, 1988) [hereinafter "Order"]. For the reasons set forth below, the Licensing Board should reconsider its order of April 5, 1988. In the alternative, the Licensing Board's order of April 5, 1988 should be clarified.

II. BACKGROUND

On March 8, 1988, TU Electric Company, lead Applicant for an operating license for the Comanche Peak facility, filed a motion to consolidate the Operating License and Construction Permit Amendment proceedings which are currently pending before the same Licensing Board. "Applicants' Motion to Consolidate Proceedings" (March 8, 1988) [hereinafter "Applicants' Motion"]. The Staff supported Applicants' motion. "NRC Staff's Response in Support of Applicants' Motion to

DS07

Consolidate Proceedings" (March 30, 1988) [hereinafter "Staff Response"]. Intervenor Citizens Association for Sound Energy (CASE) opposed the motion. "CASE's Answer to Applicants' 3/8/88 Motion to Consolidate Proceedings" (March 30, 1988). On April 5, 1988, the Licensing Board issued an order denying Applicants' motion. The Licensing Board relies on Intervenor's argument that until the Operating License proceeding is completed, and it is clear what mistakes were made either through admissions or Board findings, the motive for and repudiation of those mistakes should not be litigated. Order at 2. For the reasons set forth below, the Board should reconsider its order, or in the alternative, should clarify the order.

### III. ARGUMENT

A. The Licensing Board should reconsider its decision to deny Applicants' motion for consolidation of the OL and CPA proceedings

The Licensing Board's Order has four consequences which are inconsistent with longstanding Commission practice and procedure. These consequences are:

1. Unnecessary uncertainties are created concerning the status of a construction permit after it has been determined that an operating license should issue;
2. Evidence taken in a construction permit proceeding which follows an operating license proceeding creates a situation which could result in reopening and relitigation of operating license issues;
3. The operating license proceeding is turned into an on-the-record discovery proceeding for the construction permit extension proceeding; and

4. Substantial delay is permitted in the completion of the construction permit proceeding contrary to the Commission's policy statement on the conduct of licensing proceedings. Statement of Policy on Conduct of Licensing Proceedings CLI-81-8, 13 NRC 452 (1981).

First, the Licensing Board's order creates unnecessary uncertainties as to the status of the construction permit once the Licensing Board makes findings which would lead to the issuance of the operating license. In the OL proceeding the Applicants must demonstrate that there is reasonable assurance that previously identified deficiencies have been corrected, so that the plant's structures, systems and components will perform their intended safety functions. In determining whether there is good cause for the extension of a construction permit, the Commission has decided that good cause exists if an applicant can demonstrate that it has undertaken a policy to construct a safe plant which meets NRC requirements. Texas Utilities Electric Company, et al. (Comanche Peak Steam Electric Station), DLI-86-15, 24 NRC 397, 401-403 (1986). In the OL proceeding, the evidence will focus primarily on the adequacy of Applicant's corrective actions. In the CPA proceeding a two-part contention has been admitted. The evidence in that proceeding would focus on whether Applicants had an intentional policy of violating Commission regulations, and whether that policy has been discarded or repudiated. In light of the Commission's decision in CLI-86-15, supra, the evidence in the OL proceeding and the evidence on the repudiation portion of the CPA contention would be the same. If the Licensing Board finds that Applicants have met their burden in the OL proceeding, then nothing remains to be litigated with respect to repudiation in the CPA proceeding. Since both motive and lack of repudiation must be established to deny the

CP extension, there would be no need at all for a CPA hearing. Consolidation would eliminate this uncertainty as to the status of the CP once the OL proceeding is completed.

Second, the Board's order creates a situation where evidence offered in the CPA proceeding could actually be an attempt to reopen and relitigate issues in the OL proceeding. The Licensing Board in its order relies on Intervenor's suggestion that after the evidence has been submitted in the OL proceeding, a prehearing conference should be held at which time CASE will designate the evidence on which it intends to rely in the CPA proceeding. <sup>1/</sup> Order at 2. The Board relied on Intervenor's view that the CPA proceeding would be a relatively narrow proceeding focused on information beyond that presented in the OL proceeding relating to motive. Id. <sup>2/</sup> The result of the Licensing Board's order is to create a situation where it will be necessary to determine whether Intervenor intends to present information which is clearly beyond the information which was or should have been presented in the OL proceeding, or whether the Intervenor is attempting to supplement its evidence on the Operating License issues. Efficiency in the conduct of the agency's business is not fostered by such arguments. Consolidation would eliminate these potential sources of inefficiency.

---

<sup>1/</sup> Of course, if Applicants prevail in the OL proceeding then the designation of evidence to be heard in the CPA proceeding would serve no purpose. No CPA issues would remain to be litigated.

<sup>2/</sup> It is not clear from the Licensing Board's Order that the scope of the CPA proceeding would, in fact, be limited to a hearing on motive. Order at 2.

Next, the Licensing Board's order makes the OL proceeding into an on-the-record discovery mechanism. The Licensing Board's reasoning does not take account of the existence of a specific contention in the CPA proceeding for which bases were provided. The Licensing Board interpreted this contention in light of the stated bases. Texas Utilities Electric Company, et al. (Comanche Peak Steam Electric Station, Unit 1), LBP-86-36A, 24 NRC 575, 581 (1986). As both the Applicants and Staff have pointed out in their previous submissions to the Licensing Board, the evidence concerning these bases and the evidence in the OL proceeding would largely be the same. Applicants' Motion at 5-12; Staff Response at 6-9.

The result of the Licensing Board's order is to allow the OL proceeding to become a discovery mechanism for Intervenors to support their contention in the CPA proceeding. This result leaves it unclear as to the status of the bases for the CPA contention. For example, are Intervenors to be allowed to expand their contention to include issues not raised in the bases for the CPA contention? The order of these proceedings could also lead to numerous disputes as to what evidence should be admitted in the OL proceeding. Such disputes could be largely eliminated by consolidation of the two proceedings.

Finally, the result of the Licensing Board's order would be to substantially delay completion of the CPA proceeding, contrary to the Commission's policy statement on the conduct of licensing proceedings. Pursuant to that policy statement, proceedings are to be conducted as expeditiously as possible taking into consideration that the hearings are fair and produce a record which leads to a high quality decision.

13 NRC at 453. As discussed by the Staff, consolidation would eliminate such delay. For the reasons discussed above, the Staff requests that the Licensing Board reconsider its decision not to consolidate these proceedings.

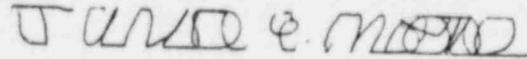
B. In the event the Licensing Board denies the Staff's motion on reconsideration, the Board should clarify its order pertaining to the time for commencement of the CPA proceeding

In its order of April 5, 1988, the Licensing Board found persuasive CASE's suggestion that after the submission of the evidence in the OL proceeding, a prehearing conference should be held in which CASE would designate the evidence it intends to offer in the CPA proceeding. This statement is inconsistent with a later statement by CASE, relied upon by the Licensing Board, that one must await the outcome of the OL proceeding to determine what mistakes have been made either through admissions or Board findings. This statement implies that the commencement of the CPA proceeding must await the Board's decision in the OL proceeding. As discussed above, there would remain no CPA issue to be heard if Applicants prevail in the OL proceeding. Moreover, the Board's order could result in the anomalous situation of approval of an OL while the CPA proceeding is still pending. The result could also be to substantially delay the completion of the CPA proceeding. The Staff requests the Licensing Board to clarify its ruling as to at what point after the OL hearings end, the CPA proceeding would commence.

IV. CONCLUSION

For the reasons set forth above, the Staff moves the Licensing Board for reconsideration of its April 5, 1988 order or, in the alternative, for clarification of that same order.

Respectfully submitted,



Janice E. Moore  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 15th day of April, 1988

DOCKETED  
USNRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'88 APR 18 A11:24

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

In the Matter of )  
 )  
TEXAS UTILITIES ELECTRIC ) Docket Nos. 50-445-OL  
COMPANY, ET AL. ) 50-446-OL  
 ) 50-445-CPA  
(Comanche Peak Steam Electric )  
Station, Units 1 and 2) )

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF MOTION FOR RECONSIDERATION OR CLARIFICATION OF ORDER OF APRIL 5, 1988" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 15th day of April, 1988:

Peter B. Bloch, Esq., Chairman\*  
Administrative Judge  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Dr. Kenneth A. McCollom  
Administrative Judge  
1107 West Knapp  
Stillwater, OK 74075

Elizabeth B. Johnson  
Administrative Judge  
Oak Ridge National Laboratory  
P.O. Box X, Building 3500  
Oak Ridge, TN 37830

Dr. Walter H. Jordan  
Administrative Judge  
881 West Outer Drive  
Oak Ridge, TN 37830

Mrs. Juanita Ellis  
President, CASE  
1426 South Polk Street  
Dallas, TX 75224

Renea Hicks, Esq.  
Assistant Attorney General  
Environmental Protection Division  
P.O. Box 12548, Capital Station  
Austin, TX 78711

Robert A. Wooldridge, Esq.  
Worsham, Forsythe, Samples  
& Wooldridge  
2001 Bryan Tower, Suite 3200  
Dallas, TX 75201

Joseph Gallo, Esq.  
Hopkins & Sutter  
Suite 1250  
1050 Connecticut Avenue, N.W.  
Washington, DC 20036

Billie Pirner Garde  
CAP - Midwest Office  
104 E. Wisconsin Avenue - B  
Appleton, WI 54911-4897

William L. Brown, Esq.\*  
U.S. Nuclear Regulatory Commission  
611 Ryan Plaza Drive, Suite 1000  
Arlington, TX 76011

Asst. Director for Inspec. Programs  
Comanche Peak Project Division  
U.S. Nuclear Regulatory Commission  
P. O. Box 1029  
Granbury, TX 76048

Lanny Alan Sinkin  
Christic Institute  
1324 North Capitol Street  
Washington, DC 20002

Robert D. Martin\*  
U.S. Nuclear Regulatory Commission  
611 Ryan Plaza Drive, Suite 1000  
Arlington, TX 76011

Robert A. Jablon, Esq.  
Spiegel & McDiarmid  
1350 New York Avenue, N.W.  
Washington, DC 20005-4798

Jack R. Newman, Esq.  
Newman & Holtzinger, P.C.  
Suite 1000  
1615 L Street, N.W.  
Washington, D.C. 20036

Docketing and Service Section\*  
Office of the Secretary  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Mr. W. G. Council  
Executive Vice President  
Texas Utilities Generating Company  
400 North Olive Street, L.B. 81  
Dallas, TX 75201

Anthony Z. Roisman, Esq.  
Suite 600  
1401 New York Avenue, NW  
Washington, DC 20005

William H. Burchette, Esq.  
Mark D. Nozette, Esq.  
Heron, Burchette, Ruckert  
& Rothwell, Suite 700  
1025 Thomas Jefferson Street, N.W.  
Washington, DC 20007

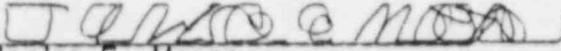
James M. McCaughy  
GDS Assoc. Inc.  
1850 Parkway Pl., Suite 720  
Marietta, GA 30067

Atomic Safety and Licensing Board  
Board Panel\*  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Atomic Safety and Licensing Appeal  
Board Panel\*  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Robert M. Fillmore  
Worsham, Forsythe, Samples  
& Wooldridge  
2001 Bryan Tower, Suite 3200  
Dallas, Texas 75201

Adjudicatory File\*  
Atomic Safety and Licensing Board  
Panel Docket  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

  
Janice E. Moore  
Counsel for NRC Staff